No. 07-14951-BB

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

UNITED STATES POSTAL SERVICE

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, the National Labor Relations Board certifies the following list of those known to have an interest in the outcome of this case:

Robert J. Battista, Former Chairman, NLRB
Valerie Bennett, Counsel for the General Counsel, Region 15, NLRB
Bobby Cline, Charging Party (before NLRB)
Linda Dreeben, Deputy Associate General Counsel, NLRB
John H. Ferguson, Associate General Counsel, NLRB
David Habenstreit, Assistant General Counsel, NLRB
John E. Higgins, Jr., Deputy General Counsel, NLRB
Rodney D. Johnson, Regional Director, Region 15, NLRB
Wilma B. Liebman, Member, NLRB
Michael A. Marcionese, Administrative Law Judge
Kevin McClue, Counsel for the General Counsel, Region 15, NLRB
Ronald Meisburg, General Counsel, NLRB
National Labor Relations Board
John C. Oldenburg, Attorney for Respondent
United States Postal Service, Respondent
Kira Dellinger Vol, Attorney, NLRB
Dennis P. Walsh, Former Member, NLRB

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board to enforce a Board order against the United States Postal Service ("USPS"). The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)), and Section 1209(a) of the Postal Reorganization Act (39 U.S.C. § 1209(a)). The Decision and Order, issued on June 28, 2007, and reported at 350

NLRB No. 12, is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Board applied for enforcement of its order on October 22, 2007. The application was timely filed, as the Act imposes no time limit for such filings, and the Court has jurisdiction pursuant to Section 10(e) of the Act because the unfair labor practice at issue in this case occurred in Destin, Florida.

STATEMENT OF THE ISSUE PRESENTED

It is an unfair labor practice under Section 8(a)(1) of the Act for an employer to retaliate against an employee because of the employee's exercise of protected rights under Section 7 of the Act. In this case, USPS supervisor Bobby Powers threatened employee Bobby Cline with a lawsuit and general reprisals in retaliation for Cline's protected filing of a charge with the Board. The issue before the Court is whether the Board reasonably found a Section 8(a)(1) violation here. More specifically, the Court must determine:

1. Whether the Board reasonably attributed Powers' threats to the USPS.
2. Whether the Board reasonably found that Powers' threats were not protected speech under the First Amendment.
3. Whether the Board reasonably found that the fact that the unlawful conduct included a threat to sue did not insulate the USPS from

unfair-labor-practice liability under the petition clause of the First Amendment.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by USPS employee Bobby Cline. (D&O 2, 4; GCX 1(a)-(j).)[1] Following a hearing, an administrative law judge issued a bench decision finding that the USPS had, through its supervisor Bobby Powers, violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening Cline with unspecified reprisals and a lawsuit because Cline had filed unfair-labor-practice charges with the Board. (D&O 1, 3.) The USPS filed exceptions to the judge's decision, arguing, *inter alia*, that its threat to sue was privileged under *BE&K Construction Co. v. NLRB*, 536 U.S 516, 122 S. Ct. 2390 (2002). (D&O 1.) The Board (Chairman Battista and Members Liebman and Walsh) denied those exceptions and affirmed the judge's decision in its June 28, 2007 Decision and Order. The USPS then filed a motion for reconsideration,

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[1] "D&O" refers to the Board's Decision and Order and "Denial of Reconsideration" describes the Board's Order Denying Motion for Reconsideration. Both documents are in Volume III of the record (RIII), and in the USPS' Record Excerpts. The transcript of the hearing before the administrative law judge, Volume I of the record, is cited as "Tr." "GCX" refers to the General Counsel's Exhibits from that hearing, which can be found in Volume II of the Record. References preceding a semicolon are to the Board's findings; those following one are to the supporting evidence.

which the Board denied in a September 28, 2007 order, which is reported at 351 NLRB No. 23. (D&O 1, Denial of Reconsideration.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The USPS operates a post office in Destin, Florida, which has a satellite office in nearby Miramar. (D&O 1, 4; Tr 57.) In late 2004, Bobby Powers, a USPS supervisor, worked at both the Destin and Miramar offices, but primarily at Miramar. (D&O 1, 4; Tr 11, 13, 45, 65-66.) On August 25 of that year, USPS employee Eileen Wittic discovered some white powder in a tray of letters at Destin. She showed the powder to Powers, who was supervising the office at the time. (D&O 1, 4; Tr 17.) After making a call, Powers had a maintenance employee transfer the letters to a clean tray, and instructed the Destin employees to process them. Wittic and her coworkers Bobby Cline and Marcus Jackson protested that order as unsafe. (D&O 1, 4; Tr 18-19, 21.) Powers ultimately overrode their disagreement and instructed Jackson, who was pursuing the issue in his role as union steward, to "shut up." (D&O 1, 4; Tr 21-22, 76, 93.) Powers further prevented Jackson from making a phone call, stating that he would clock Jackson out unless the steward returned immediately to work. (D&O 1, 4; Tr 22, 76.)

Following the powder incident, Cline filed an unfair-labor-practice charge with the Board, naming the USPS and supervisor Powers. In the charge, he alleged that Powers had "refused to allow Union Steward Marcus Jackson to perform his Union duties" during the August 25 incident. (D&O 1, 4; GCX 1(a), Tr 22-23.) Powers received the charge on September 23, 2004, while working at the Miramar office. (D&O 1, 4; GCX 1(b), Tr 86.)

From work that same day, Powers called Cline, who was working at the Destin office, to discuss the charge. (D&O 1, 4-5; Tr 14, 87.) When Cline answered, Powers identified himself, told Cline that he had received the charge, and asked Cline what the charge was about. (D&O 1, 4-5; Tr 24, 69.) Cline informed Powers that the charge concerned Powers' interference with Jackson's union activities during the powder incident –Powers' refusal to let Jackson pursue inquiries regarding the powder on behalf of Cline and other employees. (D&O 1, 5; Tr 24, 69.) After Cline's explanation, Powers' demeanor changed abruptly and he began to yell at Cline. (D&O 1, 5; Tr 25, 78.) Powers asserted that Cline would be sorry to have filed the charge, warned that Cline "had better get a good attorney, because he was going to sue [Cline]," and claimed that he, Powers, "already had a good attorney." (D&O 1, 5; Tr 25.) Then, before Cline had an opportunity to respond, Powers immediately slammed down the phone. (D&O 1; Tr 25.)

In fact, Powers had not obtained, and did not subsequently obtain, a lawyer. Nor did he sue Cline. (D&O 1; Tr 78, 83.) Cline, however, filed a charge with the Board, alleging that the USPS, through Powers, had threatened to retaliate for his initial powder-incident charge. (D&O 1, 2-3; GCX 1(d), (g).)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found (D&O 1), in agreement with the administrative law judge, that the USPS violated Section 8(a)(1) of the Act by threatening to retaliate against Cline because Cline had filed an unfair-labor-practice charge with the Board.

To remedy that unfair labor practice, the Board's order requires the Company to cease and desist from threatening employees with a lawsuit or other reprisals for filing unfair-labor-practice charges with the Board and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (D&O 2, 3.) Affirmatively, the order requires the Company to post a remedial notice. (D&O 2, 3.)

SUMMARY OF ARGUMENT

This case involves a straightforward violation of Section 8(a)(1) of the Act – a supervisor's threats of reprisals against his supervisee in retaliation for the supervisee's protected activity. The USPS does not seriously dispute the

fundamentals of the unfair labor practice: That Cline's conduct in filing a charge with the Board was protected, that Powers threatened him in retaliation for that conduct, and that Powers is a statutory supervisor and agent of the USPS. Instead, the USPS attempts to evade responsibility for its supervisor's threats by asserting that he spoke as a "citizen," not a USPS agent; that the threats were protected as Powers' free speech within the meaning of the First Amendment; and that Powers' threats were protected under the petition clause of the First Amendment as conduct incidental to potential litigation that never occurred.

The argument that Powers is not a USPS agent is unavailing, both because the USPS has admitted his statutory status as its supervisor and its agent, and because the facts of record – Powers' role as Cline's supervisor, his retaliation for a work-related complaint, the scope of his threats, and his attitude on the phone – support those admissions. The contentions that Powers spoke only as a "citizen" and that his threats constituted protected speech rest on an inapposite line of cases involving Section 1983 claims. Moreover, the Supreme Court has specifically held in the labor context that the First Amendment does not insulate retaliatory threats.

Finally, the USPS glosses over both the material facts in the instant case and the nuances of existing law in its effort to fit Powers' threats within the protection of the petition clause of the First Amendment. Even assuming, as the Board did for purposes of its decision here, that petitioning immunity extends to incidental

conduct in the labor-law context – which no court has yet to decide – a blanket rule that all threats to sue qualify as protected incidental conduct is inconsistent with the sort of balancing test that the Supreme Court established for evaluating claims of protected incidental conduct in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[2] In the instant case, Powers issued his unconsummated threat to sue as part of remarks constituting a quintessential unfair labor practice. That threat – which gave Cline no indication of the legal or factual basis for such a suit, or any opportunity to "settle" – is readily distinguishable from more typical pre-litigation activity recognized as protected in the cases upon which the USPS relies. Given those facts, the Board here reasonably found no constitutional issue either requiring reinterpretation of settled principles under the Act or conferring immunity on Powers' otherwise unlawful coercion of Cline.

ARGUMENT

A. Standard of Review

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law.[3] The Board's findings of fact are "conclusive" if supported by substantial

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[2] 486 U.S. 492, 108 S. Ct. 1931 (1988).

[3] *See U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1255 & n.6 (11th Cir. 1991) (citing *Chevron, U.S.A. v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S. Ct. 2778 (1984)).

evidence on the record considered as a whole.[4] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."[5] Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*.[6]

B. An Employer Violates the Act when Its Supervisor Threatens an Employee in Retaliation for Protected Activity

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." And it is well established, even "axiomatic," that the filing of a charge before the Board constitutes a protected activity within the meaning of Section 7.[7] Pursuant to Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), it is "an

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[4] 29 U.S.C. § 160(e); *Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366, 118 S. Ct. 818, 823 (1998); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 464 (1951); *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 734 (11th Cir. 1998).

[5] *Universal Camera*, 340 U.S. at 477, 71 S. Ct. at 459; *Triple A*, 136 F.3d at 734.

[6] *See Universal Camera*, 340 U.S. at 488, 71 S. Ct. at 645.

[7] *See, e.g., United States Postal Service*, 345 NLRB 1203, 1217, *enf'd mem.*, 2007 WL 3339184 (9th Cir. 2007).

unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." An employer thus violates Section 8(a)(1) when it threatens an employee with retaliation because the employee engaged in protected activity.[8] In such cases, the Board will find an unfair labor practice if an employee would reasonably perceive the challenged comment as a threat.[9]

The Board has found violations in cases where the employer did not specify the precise form of the threatened retaliation.[10] The reasonable perception of supervisor threats is, after all, influenced by the fact that supervisors – and particularly direct, first-line supervisors like Powers – typically have the power to influence many facets of an employee's work life, from concrete terms such as task assignments to intangible conditions like the congeniality of the workplace. The Board has also long held that retaliatory threats to sue employees may constitute

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[8] *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-19, 89 S. Ct. 1918, 1941-43 (1969); *Carborundum Materials Corp.*, 286 NLRB 1321, 1321-22 (1987).

[9] *See SKD Jonesville Div., L.P.*, 340 NLRB 101, 101 (2003). *See also NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1421 (11th Cir. 1998) ("An employer violates [Section] 8(a)(1) when its actions would reasonably tend to coerce employees in the exercise of protected [Section] 7 rights.")

[10] *See, e.g., SKD Jonesville*, 240 NLRB at 101 (Supervisor told employee that "it wasn't in [her] best interests to be getting involved with the union."), and cases cited therein.

unfair labor practices within the meaning of the Act, particularly when combined with more generalized threats of reprisal.[11]

Finally, the Board, with court approval, has long held employers responsible for the conduct, including threats, of their statutory supervisors.[12] That attribution of responsibility is reasonable, given that employers present supervisors to employees as endowed with a certain level of authority in the workplace. And it is particularly apt in certain circumstances, namely when the threatening supervisor is directly in charge of the threatened employee, the threat targets the employee

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[11] *See, e.g., Carborundum Materials*, 286 NLRB 1321, 1321 (1987); *Clyde Taylor Co.*, 127 NLRB 103, 108 (1960), overruling by the Board on other grounds recognized in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 739, 103 S. Ct. 2161, 2168 (1983).

[12] *See Willamette Indus.*, 341 NLRB 560, 565 n.1 (2004) (denying employer leave to amend answer to deny that admitted statutory supervisor was agent, according to "well settled" principle that a statutory supervisor is an employer agent); *Grouse Mountain Assocs. II*, 333 NLRB 1322, 1322, 1338 n.7 (2001) (finding employer bound by acts of its statutory supervisor, even if acts were unauthorized or contrary to employer's training), *enf'd mem.*, 56 Fed. Appx. 811 (9th Cir. 2003); *Excel DPM of Arkansas*, 324 NLRB 880, 882 n.2 (1997) (employing same principle to resolve case on summary judgment despite employer's denial of agency); *3E Co.*, 313 NLRB 12, 12 n.1 (1993) (specifically disavowing judge's discussion of whether employer had authorized supervisor's comments, and attributing them to employer because of his supervisory status), *enf'd*, 26 F.3d 1 (1st Cir. 1994); *Maidsville Coal Co.*, 257 NLRB 1106, 1106, 1122-23 (1981) (employer responsible for statutory supervisor's threats), *enf'd*, 718 F.2d 658 (6th Cir. 1983) (en banc); *Glenroy Constr. Co.*, 215 NLRB 866, 867 (1974) (employer bound by foreman's threat because he was a supervisor), *enf'd*, 527 F.2d 465 (7th Cir. 1965).

personally, and the threat is related to the employee's critique of that supervisor's actions in a supervisory capacity.[13]

C. The USPS Violated Section 8(a)(1) of the Act when Powers Threatened Cline with a Lawsuit and Other Unspecified Reprisals

Substantial evidence and extant law support the Board's finding that the USPS violated Section 8(a)(1) when its supervisor, Powers, threatened employee Cline in retaliation for Cline's indisputably protected act of filing a charge with the Board. As described above, Powers called Cline at work and initiated a discussion of Cline's charge. After Cline explained the charge, at Powers' insistence, Powers lost his temper, yelling at Cline, telling Cline he would be sorry to have filed the charge, and warning Cline to "get a good attorney because he was going to sue [Cline]" and already had a good attorney himself. He then hung up before Cline could respond.

Those facts are, as the Board noted (D&O 1, 6-7), very similar to the facts that led the Board to find an unfair labor practice in *Carborundum Materials, Incorporated*.[14] In that case, the Board found an employer liable for a department

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[13] *See Carborundum Materials Corp.*, 286 NLRB 1321, 1321-22 (1987). *Compare United States Postal Service*, 275 NLRB 360, 361-62 (1985). *Cf. Utility Workers of America*, 312 NLRB 1143, 1144 n.2 (1993) (union responsible for officer's threat to sue employees because they had challenged his conduct as a union agent and had gotten court order against the union) (citing *Carborundum*).

[14] 286 NLRB 1321 (1987).

foreman's threats of unspecified reprisals against, and to sue, one of his supervisees.[15] It explicitly rejected the judge's finding, similar to the USPS' argument here (Br 45-46), that the employer was not responsible for the threats because they related to a personal lawsuit by a low-level supervisor, did not involve any threat of retaliation in the workplace, and were made without the knowledge of the employer.[16] In finding the violation, the Board emphasized that the foreman was a permanent supervisor; that he had threatened to "get" the employee as well as to sue her, implying workplace retaliation "within the framework of his supervisory responsibilities"; and that the charge for which he threatened the employee had alleged interference with her rights by the employer and had led to an investigation of the foreman's conduct as a supervisor.[17]

Likewise here, as the Board explained (D&O 1, 6-7) Powers is a permanent low-level supervisor who directly supervises Cline – and an admitted statutory supervisor and agent of the USPS. (GCX 1(j) ¶5, GCX 1(l) ¶5.) He threatened Cline with not only a lawsuit but also unspecified reprisals. And he issued those threats during work, in retaliation for a charge based on actions he took while fulfilling his supervisory duties towards Cline and other employees. Each of those

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15 *Id.* at 1321.

16 *Id.*

17 *Id.* at 1321-22.

factors link Powers' threats to his job and to his supervisory role, and thus to the USPS.

Moreover, as the Board explained in response to a USPS argument below (D&O 1, 6) – and as the Board in *Carborundum* discussed in response to the employer's argument there,[18] the contrasting facts of another case where the Board did *not* attribute a supervisor's statement to the USPS support the propriety of the attribution here. In *United States Postal Service*,[19] the Board found no employer responsibility when a *temporary* supervisor threatened the *union* with a lawsuit because of grievances filed protesting the employer's preferential treatment of her in her usual capacity, as a *non-supervisory* employee. Here, again, Powers is a permanent supervisor, he threatened his supervisee directly, and the threat was in retaliation for a challenge to his actions as a supervisor.

The Board reasonably attributed Powers' threats to the USPS (D&O 1, 5-7), given that he is an admitted statutory supervisor and agent, and that an employee would reasonably have perceived him to be acting as a supervisor when he called Cline at work to discuss a Board charge related to his conduct as a supervisor. As the Board noted (D&O 1, 6), Powers "was not calling [Cline] to discuss a personal dispute or grievance that they had between them – say, a dispute over whether

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18 *See id.*

19 275 NLRB 360, 361-62 (1985).

money was owed or whether there had been some incident that occurred out of work that they were angry about. He was calling him about an issue that occurred in the work place, in his capacity as a supervisor, that led to the filing of an unfair labor practice charge."

In sum, it is undisputed that Cline's conduct in filing a charge before the Board was protected, and there is no real question that Powers made his threats in retaliation for that protected conduct. It is only logical to conclude, as the Board did (D&O 1, 7), that an employee would reasonably perceive as threatening his supervisor's hot-tempered warning that he would be sorry and that the supervisor intended to sue him and had retained an attorney for that purpose. Indeed, by yelling at Cline that he would be sorry, Powers distanced the informal threat to sue from a formal legal demand, and brought it closer to typical workplace bullying. The generalized threat implied that Powers' reprisals for Cline's charge would go beyond any eventual lawsuit to invade their workplace relationship.

D. The USPS' Defenses Are Without Merit

The USPS does not seriously challenge the fundamentals of the unfair labor practice found. Instead, the USPS argues that the Board erred in attributing Powers' comments to it; that the comments are protected speech under the First Amendment; and that a threat to sue is protected pre-petitioning under the First Amendment or, in the alternative, that the Act should not be interpreted to sanction

such pre-petitioning in the interests of constitutional avoidance. Each of those attacks fails for the reasons outlined in the following sections of this brief.

1. The Board reasonably attributed Powers' threats to the USPS

The USPS attempts to avoid responsibility for Powers' threats by arguing that they were outside of his role as a common-law agent. It further contends that Powers spoke for himself, as a "citizen" rather than as a USPS employee. Both of those arguments rest on faulty legal and factual grounds.

The USPS refers the Court to several cases applying common-law agency principles (Br 43-45, 48), asserting that Powers was not a USPS agent when he threatened Cline with a lawsuit because, the USPS asserts, he had neither actual nor apparent authority to commit the USPS to a lawsuit, and in fact spoke of a personal lawsuit. The USPS' cases in support of that argument, and the detailed apparent-authority analysis that they employ, are fundamentally inapposite here. Those agency principles apply to determine whether an individual is a statutory agent whose actions are attributable to his principal.[20] But, as explained above (pages 10-12), the Board has long held that statutory supervisors hold that status. Accordingly, the Board generally applies the sort of detailed apparent-authority

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[20] *See Longshoremen ILA*, 313 NLRB 412, 415 (1993) (Section 2(13) defines "agent" under the Act according to common-law principles of agency), *petition for review granted*, 56 F.3d 205, 212 (D.C. Cir. 1995) (holding "[i]n considering questions of agency under the [Act], we must construe section 2(13)," and that section is to be construed according to common-law agency principles).

analysis that the USPS advocates here only once it has found that the employee at issue is *not* a statutory supervisor, in order to determine whether a reasonable employee might nonetheless attribute the non-supervisory employee's words to the employer.[21] There was no need for such an analysis in this case because the USPS admitted that Powers was a statutory supervisor.

In any event, the USPS has *admitted* (Complaint ¶5, Answer ¶5) not only Powers' status as a statutory supervisor within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)), but *also* as its statutory agent within the meaning of Section 2(13) of the Act (29 U.S.C. § 152(13)). And the record supports those admissions. The USPS' agency argument overlooks the impact of Powers' threat to sue having been intertwined with a threat of unspecified reprisals, which a reasonable employee could understand as a threat of workplace repercussions. There is no question that Powers supervised Cline and had actual – and apparent – authority to affect various aspects of Cline's daily worklife, from task assignments, to leave approval, to overtime, to discipline and job tenure. (Tr 26, 31, 95). And a

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[21] *See, e.g., Valley Slurry Seal Co.*, 343 NLRB 233, 233, 246-47 (2004); *Southern Bag Corp.*, 315 NLRB 725, 725-26 (1994); *Great Am. Prods.*, 312 NLRB 962, 962-63 (1993) (holding employer responsible for one leadman as supervisor; finding other leadman not supervisor but employer nonetheless responsible for him as agent). *Cf. Cooper Hand Tools*, 328 NLRB 145, 145 (1999) (declining to pass on judge's finding that individuals were statutory supervisors because it found they were statutory agents), *petition for review denied*, 8 Fed. Appx. 610 (9th Cir. 2001).

supervisor's threat of workplace reprisals in retaliation for protected activity is a quintessential Section 8(a)(1) violation.

The USPS' second attempt to avoid responsibility, its contention that Powers spoke as a First Amendment protected "citizen," is off-base. As an initial matter, the Section 1983 cases that the USPS cites to support this argument are inapposite. They deal not only with an entirely different statute but also with markedly different situations from the one at issue in the present case.

The USPS first relies on cases (Br 46-48) illustrating the proposition that not every action by a government official is state action subject to constitutional constraints.[22] But, of course, there is no allegation in this case that Powers violated Cline's constitutional rights. With respect to the USPS' effort to analogize his conduct in his supervisory role to Section 1983 defendants' actions that were not "under color of law," Powers – as discussed above – threatened Cline in his role as Cline's supervisor, and in the context of a workplace where the USPS admits he functions as its statutory supervisor and agent.

As for the USPS' reliance (Br 50-52) on *Garcetti v. Ceballos*,[23] that case is part of a long line of Section 1983 cases in which the courts have balanced

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[22] *Gritchen v. Collier*, 254 F.3d 807, 812-13 (9th Cir. 2001); *Colombo v. O'Connell*, 310 F.3d 115, 117-18 (2nd Cir. 2002) (no-state-action finding was alternative to primary holding that plaintiff failed to show injury).

[23] 547 U.S. 410, 126 S. Ct. 1951 (2006).

government employees' speech rights as citizens with the government's management interests *as an employer*.[24] The basic rule ("the *Pickering* balancing test") emanating from those cases is that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the courts will generally not interfere, in the name of the First Amendment, with personnel decisions based on the employee's speech.[25] In other words, the *Pickering* test is meant to ensure that individuals retain the same rights as other citizens when they accept public employment, not to give government employees more rights than other employees who do not work for the state.[26]

Here, none of the balancing implicated in that test is relevant. The government *as employer* (USPS) has not taken any adverse action against Powers because of his threats to Cline. The government agency acting in this case is the Board. And it has sanctioned the USPS, not Powers. The entire line of precedent is simply inapposite.

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[24] *Garcetti*, 547 U.S. at 416, 420, 126 S. Ct. at 1957, 1959; *Connick v. Myers*, 461 U.S. 138, 140, 142, 103 S. Ct. 1684, 1686-87 (1983) (*citing Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968)). *Accord Boyce v. Andrew*, 510 F.3d 1333, 1342-43 (11th Cir. 2007).

[25] *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690. *Accord Boyce*, 510 F.3d at 1345 (quoting *Connick*).

[26] *See Connick*, 461 U.S. at 147, 103 S. Ct. at 1690.

Moreover, if applied, the *Pickering* line of cases would not support the USPS' position that Powers' threats were somehow immunized from the Act as a citizen's speech on matters of public concern. Even if Powers' constitutional rights were at stake, his threats would not be protected because they plainly did not involve "matters of public concern."[27] Both the Supreme Court and this Court have explained that not every aspect of work in a government office is a matter of public concern and that, in particular, expressions relating to an employee's personal grievances – as opposed to the office's discharge of its public responsibilities – are not.[28] In other words, this court will examine "whether the purpose of the . . . speech was to raise issues of public concern."[29] In the instant case, there is no evidence at all – or even an allegation – that Powers' threats concerned any topic of interest to the public, much less that they were intended to advance a public interest or purpose. For that reason, *Garcetti* (and the *Pickering* line of cases generally) would not provide a defense for the USPS, even were this Court to extend their application to this context.

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[27] *See Mitchell v. Hillsborough County*, 468 F.3d 1276, 1282, 1287 (11th Cir. 2006) (determining whether speech is on matter of public concern is threshold question in *Pickering* analysis).

[28] *See Connick*, 461 U.S. at 148-49, 103 S. Ct. 1690-91; *Boyce*, 510 F.3d at 1342-43; *Mitchell*, 468 F.3d at 1283-84.

[29] *Boyce*, 510 F.3d at 1343-44 (quotation omitted). *See also Mitchell*, 468 F.3d at 1283-84 & n.18.

2. The speech clause of the First Amendment does not insulate the USPS from liability for Powers' threats

The Board reasonably rejected the USPS' effort to avoid unfair-labor-practice liability by invoking Powers' First Amendment free-speech rights. As the Board made clear in its denial of reconsideration, the Supreme Court has specifically held in *NLRB v. Gissel Packing Co.* that employers' retaliatory threats in violation of the Act are not entitled to First Amendment protection.[30] Moreover, contrary to the USPS' contention (Br 41-42), the Second Circuit did not hold in either *Colombo v. O'Connell* or in *Kerman v. New York* that a threat to sue is by itself protected speech under the First Amendment.[31] In *Colombo*, the Court found a Section 1983 claim failed because the plaintiff had not shown either an injury or that the defendant had acted "under color of law" and held, in the alternative, that a formal demand letter was protected, not as free speech, but by the First Amendment petition right, "to sue . . . in the courts."[32] In *Kerman*, the Court did not analyze the threat to sue separately from the entirety of the plaintiff's verbal

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[30] 395 U.S. at 617-20, 89 S. Ct. at 1941-43.

[31] *Columbo*, 310 F.3d 115, 118 n.2 (2d Cir. 2002); *Kerman*, 261 F.3d 229, 241-42 (2d Cir. 2001).

[32] 310 F.3d at 117-18 (quotation omitted).

assault on the defendant officers, holding that the First Amendment "protects a significant amount of verbal criticism and challenge directed at police officers."[33]

Powers' threats here – screamed warnings of legal and other reprisals, from a supervisor to his supervisee, during working time, in retaliation for a protected charge stemming from an earlier workplace incident involving allegedly improper supervisory conduct – comprise a typical Section 8(a)(1) violation, as explained above, and thus fit comfortably within the ambit of *Gissel*. Powers did not merely state a protected opinion regarding the merits of Cline's charge.[34] Nor did he confine his threats to possible recourse to the legal system. His threats were therefore not, as the USPS implies, analogous to a sanitized legal notice of intent to file a lawsuit, perhaps accompanied by a settlement proposal – a "mere announcement of the intent to seek the assistance of the judiciary" (Br 40), "society's designated neutral and ultimate caretaker of justice" (Br 35). In sum, Powers mere mention of legal action during his intimidation of Cline is not enough, under the speech clause of the First Amendment, to insulate the USPS from unfair-labor-practice liability.

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[33] 261 F.3d at 242 (quotation omitted).

[34] *See Gissel*, 395 U.S. at 617, 89 S. Ct. at 1941 (noting employer's "firmly established" statutory and constitutional right to communicate his views, argument, or opinion, "so long as such expression contains no threat of reprisal….") (quoting Section 8(c) of the Act, 29 U.S.C. § 158(c)).

3. The petition clause of the First Amendment does not shield Powers' threats

The Board reasonably held that the petition clause of the First Amendment, as effectuated through the so-called *Noerr-Pennington* doctrine,[35] does not shield the USPS from liability for Powers' litigation threat in the instant case. While, as demonstrated below, the USPS' petition-clause defense stems initially from established precedent, it seeks to expand that precedent far beyond currently accepted parameters. Moreover, the USPS seeks to apply its proposed extension of *Noerr-Pennington* jurisprudence as a blanket rule, disregarding the more nuanced, fact-specific inquiry that the Supreme Court has mandated, and which the Board found to be determinative here.

It is undisputed that the Supreme Court's and the Board's *BE&K* decisions establish that the filing of a reasonably based lawsuit is encompassed within the constitutional right to petition the government and consequently protected from liability under the Act.[36] Relying on cases arising in the antitrust and RICO

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[35] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38, 81 S. Ct. 523, 529-30 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 669-72, 85 S. Ct. 1585, 1593-94 (1965).

[36] *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390 (2002) (compelling the Board to reexamine its standard for determining when the First Amendment protects lawsuits from liability under the Act). On remand, the Board adopted the Supreme Court's antitrust "sham lawsuit" standard for determining when the petition clause does not shield a lawsuit from liability under the Act. *See BE&K Constr. Co.*, 351 NLRB No. 29, slip op. at 7-8, 2007 WL 2891098, *11

contexts, the USPS argues (Br 15-32) that conduct "incidental" to petitioning also enjoys constitutional protection, and that all litigation threats – including Powers' threat to sue Cline – fall within the shield of incidental protection. For purposes of this case, the Board accepted, arguendo, that the *Noerr-Pennington* doctrine extends to incidental conduct *in the labor context*, although no court has as of yet squarely addressed that question.[37] But the Board reasonably found that the threats at issue here, far removed in both nature and context from any actual litigation, were not incidental to a lawsuit in the constitutional sense. Given the factual basis of its holding, the Board left undefined the exact contours of any eventual application of *Noerr-Pennington* to incidental activities in the labor context.

Relying on the District of Columbia Circuit's recent analysis in *Venetian Casino Resort, L.L.C. v. NLRB*,[38] the Board held (D&O 1-2) that Powers' threats – which, "[m]ost significantly," (D&O 2) did not actually lead to a lawsuit – were

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(2007) (citing *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 1928 (1993) ("*PRE*")).

[37] *Cf. Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 612 (D.C. Cir. 2007) ("The Supreme Court has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning, i.e., employer lawsuits; it has yet to do so in labor law for 'incidental' conduct.") (citations omitted), *petition for cert. filed*, 76 USLW 3276 (Nov. 13, 2007). Like the Board, the Court in *Venetian* declined to decide the scope of immunity for incidental conduct in labor law where the employer failed to show that the challenged conduct was incidental. *Id.*

[38] 484 F.3d 601 (D.C. Cir. 2007).

not incidental to protected petitioning. *Venetian*, relying on the Supreme Court's discussion of the scope of protected incidental conduct in *Allied Tube & Conduit Corp. v. Indian Head Inc.*, expressly cautioned against taking an "absolutist" approach to immunity, such as that urged by the USPS here.[39] The thrust of *Allied* is that incidental activity is not constitutionally protected if its "context and nature" show it to be a sort of activity typically sanctioned by the law in question.[40] As the D.C. Circuit thus explained, if a threat resembles conduct "normally held violative" of the Act and is "more aptly [] characterized" as a Section 8(a)(1) violation "that happens to have an impact on litigation, rather than "typical 'pre-litigation' activity," it is not entitled to *Noerr-Pennington* immunity.[41]

As demonstrated throughout this brief, Powers' threats constituted a typical Section 8(a)(1) violation. To review, Powers' litigation threat came as part of an exchange where he yelled at his supervisee, threatening not only a lawsuit but also more general reprisals. He made those threats during work, in retaliation for the supervisee's protected activity of filing a charge with the Board protesting other allegedly unlawful behavior by Powers in a supervisory role, and slammed down

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[39] *Venetian*, 484 F.3d at 611-12 (quoting *Allied*, 486 U.S. 492, 503, 108 S. Ct. 1931, 1938 (1988)).

[40] 486 U.S. at 505, 108 S. Ct. at 1939. *Accord Venetian*, 484 F.3d at 612.

[41] *Venetian*, 484 F.3d at 612 (quoting *Allied*, 486 U.S at 507, 108 S. Ct. at 1940-41).

the phone without so much as allowing the supervisee to respond. Finally, as the Board emphasized in its analysis, Powers never filed a lawsuit, nor did the USPS demonstrate that such hot-headed threats – which provided Cline with no basis from which to glean the predicate of such a suit – would have been a prerequisite for legal action.[42]

Conversely, Powers' menacing phone call to Cline is but a distant cousin of the sort of formal demand letter that is typical of modern pre-litigation practice, and which has consequently been accorded protection as incidental to the filing of a lawsuit. Powers did not explain the legal basis of his threatened lawsuit, nor did he propose a settlement, much less give Cline any opportunity to respond or to make a counter-proposal of his own. The thrust of his message was intimidation, and its power derived from his position of authority over Cline not, as the USPS suggests (Br 21), from the existence of a neutral judicial system in the background. Moreover, Powers' threats did not, as the USPS argues threats do (Br 20-21), implicate the same First Amendment interests that the Supreme Court has

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[42] Indeed, Powers' failure to sue Cline, or even to explain the theory of any contemplated suit, leaves the Board and the Court to guess at crucial factors of the type of petition-clause analysis advocated by USPS (Br 18, 23 & n.8), such as whether that suit would have a reasonable basis. Moreover, Cline's filing of a charge with the Board was not only protected by the Act but was also *direct* petitioning of the government under the First Amendment. It is, therefore, difficult to imagine that Powers could file any non-frivolous lawsuit against Cline based on that constitutionally protected petitioning.

identified as important aspects of lawsuits. Specifically, they did not in any way vindicate him or provide a public airing of his dispute with Cline. That is because they were entirely private, but also because Powers screamed his threats at Cline without ever explaining his competing view of the underlying powder incident, thus failing to "air" the essence of his dispute even to Cline, the target of, and only witness to, his threats.

Finally, the USPS is inaccurate when it contends that this Court's law, or the weight of circuit law, support its absolutist position that all litigation threats fall within *Noerr-Pennington*. The threats in *McGuire Oil Company v. Mapco, Incorporated*, for example, related to an actual lawsuit, as the Board noted in denying the USPS' Motion for Reconsideration, and were of an entirely different nature than Powers' threats here.[43] In that case, McGuire undertook a systematic effort to prevent other companies from selling gas below cost in alleged violation of a state statute, threatening each of the offending companies with a lawsuit, and eventually suing those that failed to raise their prices.[44] This Court rejected Mapco's antitrust counterclaim, which was based on the threats and lawsuit. The Court found that the threats, even those made to companies not ultimately sued, were "acts reasonably and normally attendant upon effective litigation," and

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43 958 F.2d 1552 (11th Cir. 1992).

44 *See id.* at 1554-55.

opined that a litigator should not have to strike without warning to retain petitioning protection.[45] Significantly, all of McGuire's threats were part of a single campaign to prevent below-cost sales in a particular area, which culminated in the suit against Mapco.

In addition to that context, the *McGuire* threats were also more formal in nature than was Powers' hot-tempered bluff – McGuire's representatives repeatedly contacted Mapco's representatives directly and through an industry association, citing a specific statute that they claimed required price increases.[46] As opposed to Powers' call, McGuire's overtures were explicitly tied to legal standards and provided the recipients with an opportunity to respond. In any event, given the Supreme Court's emphasis in *Allied* on evaluating the context and nature of incidental conduct in determining its protection, *McGuire* is not directly applicable in the labor-law arena without further analysis.[47] In other words, as the Board found (Denial of Reconsideration), and contrary to the USPS' contention,

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45 *Id.* at 1560.

46 958 F.2d at 1555.

47 *Cf. Sosa v. DIRECTV*, 437 F.3d 923, 932-33 (9th Cir. 2006) (noting that the procedures and penalties of anti-trust and racketeering law are similar and probably more burdensome to the right to petition than are those of the Act, citing *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 528-29, 122 S. Ct. 2390, 2398 (2002)).

McGuire does not explicitly hold that a threat like Powers', unrelated to any actual litigation, necessarily qualifies as "incidental."

The Ninth Circuit's decision in *Sosa v. DIRECTV, Inc.* is similarly distinguishable from the instant case.[48] Whereas, in *McGuire,* one lawsuit served to further a campaign involving many threats, the threats in *Sosa* culminated in settlement. In *Sosa*, a company sent letters to individuals it suspected of pirating its broadcasts, accusing them of piracy and threatening a lawsuit unless the recipient forfeited certain equipment, promised not to pirate in the future, and paid a monetary settlement.[49] Some recipients settled with the company and then brought a RICO action against it, but the Ninth Circuit found that penalizing the demand letters under RICO would burden the company's ability to settle legal claims short of filing suit.[50] Importantly, the letters in *Sosa* – unlike Powers' threats – explicitly sought formal settlement *in lieu of* litigation and, of course, offered the recipients an opportunity to respond.

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48 *Sosa*, 437 F.3d 923.

49 437 F.3d at 926-27.

50 *See id.* at 932.

Like *McGuire* and *Sosa*, the nature and context of the threats in the USPS' other cases are distinguishable from Powers' threats here.[51] In sum, the USPS' cases do not support its proposition that the petition clause of the First Amendment protects all threats to sue, without further analysis. Given the Supreme Court's *Allied* standard for analyzing incidental conduct, adapted to the labor context by the District of Columbia Circuit Court in *Venetian*, the Board reasonably declined either to interpret the Act so as not to reach any threat to sue under any circumstances, or to find Powers' conduct constitutionally protected as incidental to petitioning.

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[51] *See United States v. Pendergraft*, 297 F.3d 1198, 1201, 1205-07 (11th Cir. 2002) (threat letter from one lawyer to another, citing legal and factual basis for threatened suit, in context of discussions about different ongoing lawsuit; court emphasized that threat was to sue the government); *Glass Equip. Dev. v. Besten, Inc.*, 174 F.3d 1337, 1343 (Fed. Cir. 1999) (GED sued some companies and threatened analogous suits against others, as part of campaign to enforce its patent); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 848 (1st Cir. 1985) (threats were part of extended settlement discussions involving attorneys); *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1360-61 (5th Cir. 1983) (worldwide campaign involving published threats to sue anyone dealing in disputed commodity and many actual such lawsuits). *See also Primetime 24 Joint Venture v. Nat'l Broadcasting Co.*, 219 F.3d 92, 96-97, 100 (2d Cir. 2000) (dicta noting extension of *Noerr-Pennington* to "threat letters" in case that involved no threat to sue).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing in full the Board's order.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 37(a)(7)(c), the Board certifies that its brief contains 7, 464 words of Times New Roman (14 point) proportional type.

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Dated at Washington, D.C.
this 10th of March, 2008

STATEMENT REGARDING ORAL ARGUMENT

Although in the Board's view this case involves the straightforward application of settled labor-law principles to uncomplicated facts, oral argument may be of assistance to the Court in light of the Postal Service's reliance on complex constitutional law doctrines in support of its arguments.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,464 words of Times New Roman (14 point) proportional type.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOAR	:	
	:	
Petitioner	:	No.07-14951-BB
	:	
v.	:	
	:	
UNITED STATES POSTAL SERVICE	:	
	:	Board Case No.
Respondent	:	15-CA-17506
	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this day sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address[es] listed below:

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